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case.

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**IN THE
COURT OF APPEALS OF INDIANA**

VALENTIN JARAMILLO,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 76A03-0608-CR-372

PPEAL FROM THE STEUBEN SUPERIOR COURT
The Honorable William C. Fee, Judge
Cause No. 76D01-0208-FB-924

February 15, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Valentin E. Jaramillo appeals his conviction of Operating a Vehicle While Intoxicated Causing Death (OWI),¹ a class B felony, and the determination that he is a Habitual Substance Offender,² and presents the following restated issues:

1. Does the Double Jeopardy Clause of either the U.S. Constitution or Indiana Constitution bar retrial with respect to sentence enhancements that were reduced and set aside upon appeal for insufficient evidence?
2. Did the trial court err in sentencing?

We affirm in part, reverse in part, and remand.

In a previous appeal, our Supreme Court summarized the relevant facts as follows:

Following a collision in August, 2002, in which a man was killed, Defendant Valentin Jaramillo was charged with Operating While Intoxicated Causing Death, a Class C felony. The State sought to have the offense enhanced to a Class B felony on grounds that he had been convicted of operating a vehicle while intoxicated in March, 1998, and sought to have Defendant adjudicated a habitual substance offender on grounds of the instant charge, the March, 1998, conviction, and a third conviction for operating while intoxicated in June, 1997. In a bifurcated proceeding, a jury first found Defendant guilty of the Class C felony and then the Class B felony and to be a habitual substance offender.

Defendant appealed the convictions, arguing that there was insufficient evidence to support the enhancement of his conviction for driving while intoxicated from a Class C felony to a Class B felony and that there was insufficient evidence to support the determination that he is a habitual substance offender.

The Court of Appeals resolved both claims in Defendant's favor, finding that the State had failed to prove that a conviction was entered on Defendant's March, 1998, guilty plea. That offense was the predicate offense for the Class B enhancement and a necessary predicate for the habitual substance offender enhancement. *Jaramillo v. State*, 803 N.E.2d 243 (Ind. Ct. App. 2004). The State does not challenge this determination

¹ Ind. Code Ann. § 9-30-5-5(a) (West 2001).

² Ind. Code Ann. § 35-50-2-10 (West 2001).

on transfer. However, the Court of Appeals also held that federal double jeopardy principles did not bar the State from retrying the defendant on the Class B and habitual substance offender enhancements. *Id.* at 250. Defendant seeks transfer on this issue.

Jaramillo v. State, 823 N.E.2d 1187, 1188 (Ind. 2005) (footnotes omitted), *cert. denied*, ___ U.S. ___ (Nov. 28, 2005).

Upon transfer, our Supreme Court addressed whether the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution (the federal Double Jeopardy Clause) bars the State from retrying a defendant on the class B felony and habitual substance offender enhancements. Our Supreme Court resolved the issue in the negative, holding “the [federal] Double Jeopardy Clause does not prevent the State from re-prosecuting a habitual offender enhancement after conviction therefore has been reversed on appeal for insufficient evidence[,]” and remanded the case to the trial court. *Id.* at 1191. Upon remand, a new jury found Jaramillo guilty of OWI as a class B felony and determined he was a habitual substance offender. Jaramillo now appeals.

1.

Jaramillo contends the federal Double Jeopardy Clause bars the State from retrying him on the class B felony and habitual substance offender enhancements where, upon appeal, the enhancements were reduced and set aside, respectively, for insufficient evidence. The State asserts Jaramillo is barred by the doctrine of *res judicata* from asserting any argument based upon the federal Double Jeopardy Clause. We agree.³

³ We note the “law of the case” doctrine does not apply here. Regarding that doctrine, our Supreme Court has stated, “[a] court has the power to revisit prior decisions *of its own or of a coordinate court* in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary

Following Jaramillo's direct appeal, our Supreme Court granted transfer and held the federal Double Jeopardy Clause does not prevent the State from retrying habitual offender enhancements after reversal upon appeal for insufficient evidence. *Jaramillo v. State*, 823 N.E.2d 1187. Jaramillo's claim to the contrary, therefore, is barred. *Matheney v. State*, 834 N.E.2d 658 (Ind. 2005).

We are still left to decide whether the Double Jeopardy Clause of the Indiana Constitution (the Indiana Double Jeopardy Clause) bars the State from retrying Jaramillo on the class B felony and habitual substance offender enhancements. In Jaramillo's original appeal, he contended the federal Double Jeopardy Clause barred retrial. Before addressing Jaramillo's contention, we noted he did not present any argument under the Indiana Double Jeopardy Clause and, as a result, waived any argument arising thereunder. *Jaramillo v. State*, 803 N.E.2d 243. In light of this omission, the State asserts Jaramillo may not challenge his retrial under the Indiana Double Jeopardy Clause.

Generally, when an issue is known and available but not raised upon direct appeal, it is waived. *Taylor v. State*, 840 N.E.2d 324 (Ind. 2006). The claim that the Indiana Double Jeopardy Clause barred retrial was available to Jaramillo during his original appeal. This is evident because, in his original appeal, Jaramillo in fact made an identical preclusion argument based upon the federal Double Jeopardy Clause. *See Jaramillo v. State*, 803 N.E.2d at 248 ("Jaramillo contends that [federal] double jeopardy principles

circumstances" *State v. Huffman*, 643 N.E.2d 899, 901 (Ind. 1994) (emphasis supplied), *reh'g denied*. This reflects the meaningful distinction for our purposes between the "law of the case" doctrine and the doctrine of *res judicata*, which is that the "[law of the case doctrine] directs discretion, [whereas *res judicata*] supersedes it and compels judgment." *S. R.R. v. Clift*, 260 U.S. 316, 319 (1922).

bar a retrial”). Jaramillo, therefore, has waived review of his claim because it was not raised in his previous appeal. *See Williams v. State*, 808 N.E.2d 652 (Ind. 2004) (claim of ineffective trial counsel was waived because it was not raised in the previous appeals).

2.

Jaramillo contends, and the State concedes, the trial court erred in sentencing because it: (1) imposed separate sentences for his OWI conviction and habitual substance offender determination; and (2) suspended a portion of his enhanced sentence imposed pursuant to the habitual substance offender statute. A sentence that is contrary to or violates a statute is illegal because it lacks statutory authorization. *Reffett v. State*, 844 N.E.2d 1072 (Ind. Ct. App. 2006). “A sentence that exceeds statutory authority constitutes fundamental error.” *Id.* at 1073.

In its sentencing memorandum, the trial court stated, “[b]y separate commitment orders now entered, the defendant is sentenced to the maximum twenty (20) years on the [OWI] Class B Felony and eight (8) years on the Habitual Substance Offender count, five (5) years of [which] are suspended. The terms are consecutive.” *Appellant’s Appendix* at 9-10. We recently stated “[a] habitual offender finding does not constitute a separate crime nor result in a separate sentence” *Reffett v. State*, 844 N.E.2d at 1074 (quoting *Greer v. State*, 680 N.E.2d 526, 527 (Ind. 1997)). Consequently, the trial court erred when it imposed a separate sentence upon the habitual substance offender finding. Further, “where a criminal defendant receives an enhanced sentence under the habitual offender statute, such sentence may not be suspended.” *Reffett v. State*, 844 N.E.2d at 1074. The trial court, therefore, erred when it suspended five years of Jaramillo’s

habitual substance offender enhancement. *Reffett v. State*, 844 N.E.2d 1072. Having found an irregularity in the trial court's sentencing decision, we exercise our option to remand to the trial court for a clarification or new sentencing determination consistent with this opinion. *Hope v. State*, 834 N.E.2d 713 (Ind. Ct. App. 2005).

Affirmed in part, reversed in part, and remanded.

KIRSCH, C.J., and RILEY, J., concur.